

Members of the committee, thank you for allowing me to speak with you today. My name is Alexander Hertel-Fernandez and I am an assistant professor of international and public affairs at Columbia University in the City of New York. My research focuses on the politics of labor, business, and public policy in the United States. I received my PhD from Harvard University in government and social policy. The views I express today are my own and do not reflect those of my employer.

I am testifying in support of S.B. 440, which would prohibit employers from pressuring their rank-and-file employees to listen to, or participate in, political activities.

Over the past five years I have been conducting research into the issue of employer political engagement in the workplace. That research has revealed that employers are increasingly communicating with their workers about politics, including about policy and elections. My research has been published in peer-reviewed academic publications as well as in a 2018 book, entitled *Politics at Work: How Companies Turn Their Workers into Lobbyists*, published by Oxford University Press.<sup>1</sup> My research has also documented how little protection American workers enjoy in the workplace related to political views and speech, as well as worrisome employer political pressure in some companies. I believe S.B. 440 represents a very important step to ensuring that Connecticut workers are free to follow their own political views without undue influence from managers and supervisors who control workers' employment and wages.

In the rest of my testimony, I will discuss why we should be concerned about political communications between employers and workers on the job, the weak existing law around employer political pressure and worker political speech and action, and what my research reveals about employer political communication and pressure in the workplace. I will conclude by discussing the protection that S.B. 440 would offer to Connecticut workers.

### **Why Political Communications in the Workplace Merit Attention**

Political communications from managers and supervisors to the workers they employ are not like other political messages. That is because employers control the wages and employment—and thus the economic livelihood—of the workers they supervise. Especially in private-sector, non-union workplaces, managers have considerable latitude to change the schedules, wages, working conditions, and employment of workers for little or no reason at all.<sup>2</sup> As a result, workers are especially sensitive to messages or requests that come from their managers—whether managers articulate a threat to them or not. Indeed, the Supreme Court recognized decades ago that speech

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<sup>1</sup> For citations, see e.g. Alexander Hertel-Fernandez and Paul Secunda. 2016. "Citizens Coerced: A Legislative Fix for Workplace Political Intimidation Post-Citizens United." *UCLA Law Review Discourse* 64(2) and Alexander Hertel-Fernandez. 2016. "How Employers Recruit Their Workers into Politics – And Why Political Scientists Should Care." *Perspectives on Politics* 14(2).

<sup>2</sup> This is the result of the at-will employment doctrine in the United States. See especially Joseph E. Slater. 2007. "The 'American Rule' That Swallows the Exceptions." *Employee Rights and Employment Policy Journal* 53. For important exceptions to the at-will doctrine, see Cynthia Estlund. 2018. "Rethinking Autocracy at Work." *Harvard Law Review* 131.

from employers to workers carries extra weight in the minds of workers given the economic control managers possess. The Court therefore placed limits on the speech employers can make during union organizing drives.<sup>3</sup>

In the context of politics, the concern is workers will have a difficult time setting aside messages and requests they might receive from their employers to participate in elections and policy debates. Workers may thus be forced to participate in political activities or express views they might disagree with in order to keep their jobs. As I explain in the subsequent section, this is a particular concern because of limited protections against political pressure in the private-sector workplace.

### **How Current Law Leaves Americans Vulnerable to Political Pressure at Work**

The United States stands largely alone among other advanced democracies in its lack of national legal protections against discrimination on the basis of political views and action in the workplace. The European Union, for instance, requires national legislation prohibiting discrimination in employment on the grounds of political opinion.<sup>4</sup> Similar provisions apply in Australia and Canada.<sup>5</sup>

By comparison, the First Amendment of the Constitution, protecting Americans' rights to speech and protest, does not apply to private-sector employees in the workplace. Moreover, the primary federal workplace discrimination statute—Title VII of the Civil Rights Act—does not cover political views or actions. Some states have passed laws to protect employees from discipline or dismissal on the basis of their views, actions, and votes, but not all have.<sup>6</sup> Connecticut has an existing law barring employers from threatening voters in the run-up to elections or from firing workers based on their votes.<sup>7</sup> The state also protects employees' free speech rights on the job.<sup>8</sup> But current federal and state law in Connecticut leaves workers unprotected if their employer requires them to listen to political, religious, or labor communications—and threatens to discharge or discipline them if they do not follow through on employers' requests.

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<sup>3</sup> *NLRB v. Gissel Packing Co.*, 1969.

<sup>4</sup> European Union Agency for Fundamental Rights and Council of Europe. *Handbook on European non-discrimination law: 2018 edition*. Luxembourg, Publications Office of the European Union, page 121.

<sup>5</sup> Hertel-Fernandez and Secunda, pages 12-13.

<sup>6</sup> For a summary, see Eugene Volokh. 2012. "Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation." *Texas Review of Law & Politics*: 16(2).

Workers do have the federal right to take actions that improve their collective standing as workers through section 7 of the National Labor Relations Act. But this Act does not cover actions that are independent of the workplace.

<sup>7</sup> General Statutes of Connecticut (Revised to January 1, 2019), Title 9, Chapter 151, Section 9-365: Employers' threats.

<sup>8</sup> General Statutes of Connecticut (Revised to January 1, 2019), Title 9, Chapter 557, Section 31-51q: Liability of employer for discipline or discharge of employee on account of employee's exercise of certain constitutional rights.

In fact, at a national level employers have gained more, not less, latitude for communicating to their workers about politics and elections, and even to require their employees to participate in politics. This is in part a product of the Supreme Court's *Citizens United v. Federal Election Commission* decision from 2010. Before *Citizens United*, private-sector employers with political action committees could only communicate to rank-and-file workers about elections and political candidates on a very limited basis. As a result of that decision, however, employers have the federal legal right to expend corporate resources to communicate with workers about electoral politics, and even to require employees to attend meetings that advocate the election of specific candidates or parties.<sup>9</sup>

To be sure, before *Citizens United* private-sector employers could always communicate to workers about politics or political issues outside of partisan elections, and in my book I document that there was issue-based outreach long before 2010. Nevertheless, there is strong evidence that the decision, as interpreted by the Federal Election Commission, has made companies more comfortable doing more to communicate with their employees about elections since 2010. According to the head of the political law practice at a prominent Washington-based law firm, the Supreme Court's "decision has also made corporations more comfortable with giving all employees educational materials or 'voter guides' that make their political positions clear ... Before the decision ... companies were more careful to make those things not slanted and not favor one candidate over another. Now I think they're pretty clear as to where they're going with those communications, even if they don't directly name candidates."<sup>10</sup> In the following section, I document the prevalence of employer communications like these—as well as instances where workers feel uncomfortable or pressured by such messages.

### **The Incidence of Employer Political Communications and Pressure**

My research indicates that employers are increasingly communicating about politics with their workers. Polling by one business association estimates that since 2000, nearly four times as many employees are now hearing about politics from their employers and in my own review of corporate activity, I found that until the late 1990s and early 2000s, employer communication about politics and political issues was not common.<sup>11</sup> That has changed, and in a nationally representative survey of U.S. workers I found that about a quarter of American employees had ever received political messages from their top managers and supervisors at work.<sup>12</sup>

Not all of those messages were partisan and many related to neutral get-out-the-vote efforts or discussions of policy or legislation that might affect particular firms or sectors. About 44 percent of American employees who received messages from their employers experienced get-out-the-vote mobilization that only discussed voter registration and turnout and was plainly nonpartisan.

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<sup>9</sup> "Citizens United at Work." 2014. *Harvard Law Review* 128. See also *Politics at Work*, chapter 5.

<sup>10</sup> Quoted in Jena McGregor. 2016. "What your boss can and can't do when it comes to politics at work." *Washington Post*: October 21.

<sup>11</sup> *Politics at Work*, chapter 5; Theo Francis. 2017. "Businesses Push Workers to Mobilize Before Tax Revamp." *Wall Street Journal*: October 29.

<sup>12</sup> *Politics at Work*, chapter 4.

Slightly less than a quarter experienced mobilization that discussed political issues (such as bills under debate in a legislature), but not political candidates. The remaining 28 percent experienced mobilization that went beyond political issues to discuss candidates.

Thus, while the majority of American workers do not receive partisan messages from their employers, a non-trivial portion representing millions of workers do—and that number has been increasing over time as employers became more comfortable communicating with their workers about politics.

The major concern about employer political messages is that workers will feel uncomfortable and pressured into following their employers' political positions. Additional surveys I conducted suggest that over a quarter of workers perceive the possibility that their employers might punish them for political views and actions, and about 16% of employees said that employer retaliation had actually happened at their workplace.<sup>13</sup> Troublingly, lower income employees were substantially more likely than higher income employees to report either fear of political coercion or actual accounts of political retaliation from their bosses. About 50% of all workers in the lowest fifth of the income distribution either reported a concern about retaliation or said that such retaliation had happened before in their workplace compared to just 26% in the highest fifth of the income distribution. It is this fear that is most problematic for workers—and for American democracy.

In my book, I recount a number of episodes of employers communicating with their workers about politics, sometimes in uncomfortable or coercive ways. Consider the following examples:<sup>14</sup>

- An Ohio coal-mining business invited Republican presidential candidate Mitt Romney to a rally at their plant. Miners were told that they would be required to attend the rally and that they would not be paid for their participation. Although managers later explained that no one was actually required to attend the event, miners still reported showing up out of fear they would be disciplined or even dismissed.
- Executives at Cintas, a provider of uniforms and other workplace supplies, and Georgia Pacific, a major paper product manufacturer, sent letters to their respective workforces expressing clear partisan stances during the 2012 election. In the case of Georgia Pacific, executives distributed a flyer that indicated all of the candidates that the business had endorsed, from the presidency down to state legislatures. These flyers also included warnings that workers “may suffer the consequences” if the company’s favored candidates were not elected.
- In the run-up to the 2012 presidential election, the CEO of a major timeshare company sent an email to all of his employees, warning them that their jobs would be threatened by “another 4 years of the same Presidential administration.” If Obama were reelected, the CEO went on to say, he “[would] have no choice but to reduce the size of the company.”

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<sup>13</sup> *Politics at Work*, chapter 4.

<sup>14</sup> *Politics at Work*, Introduction.

- Menards, a home improvement chain, has encouraged its 40,000 employees to take an online civics course at home. Though the course was billed as being optional, it was clear that managers would be tracking who did and did not pay attention to the material. Workers who passed the course were singled out for recognition in company publications. The course emphasizes the importance of the free market and how taxes, regulation, and social programs “always limit freedom” and reduce economic growth. Employees were therefore encouraged to support candidates who promised to lower taxes and regulations on job creators.
- In 2014, oil giants ConocoPhillips, BP, and ExxonMobil mobilized their workers in a battle over an Alaskan ballot measure to repeal tax cuts on oil production. The companies held mandatory employee meetings, posted signs, sent company-wide emails, and promoted websites urging workers to vote in favor of the tax cuts. I present evidence in the book that the repeal measure may have failed in part due to these mobilization drives.

In short, employers are increasingly viewing their employees as a political resource to change politics and policy; as one manager reported to me, engaging their workers in the political process offered them a lot of “bang for the buck” as they were trying to elect friendly candidates and pass favorable policies at the state and national levels. As a result, states, like Connecticut, need to step in to ensure that workers, especially low-income workers, have adequate protection against undue political pressure or coercion.

### **The Importance of New Workplace Protections Like S.B. 440**

S.B. 440 bars employers from forcing their rank-and-file employees to attend meetings or listen to speech or other communications about politics. This law would thus ensure that Connecticut workers do not feel pressured into participating in political activities favored by their managers. At the same time, employers would still be free to help their employees register and turn out to vote in non-partisan ways, something that many employers are already doing and which represents a beneficial contribution to society. And employers could share information about legislation or regulation affecting their company so long as they do not require workers to listen to the employer’s position.

The principles behind this bill are widely supported by Americans from across the ideological spectrum. In my book, I found that over three quarters of the public supported legal prohibitions on employers firing workers for not supporting company-backed political issues or candidates, including roughly similar percentages of Democrats and Republicans.<sup>15</sup> This should come as no surprise. Free speech—including the freedom not to listen—is a fundamental American value. Until the federal government protects this right in the workplace, Connecticut ought to take action itself by passing S.B. 440.

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<sup>15</sup> *Politics at Work*, Conclusion.